STATE OF MICHIGAN

COURT OF APPEALS

DONALD E. MATSCHKE,

Plaintiff-Appellant,

v

GARRY D. ZACHRITZ,

Defendant-Appellee.

UNPUBLISHED
June 2, 2005

No. 252928
Leelanau Circuit Court
LC No. 03-006306-CZ

DONALD E. MATSCHKE,

Plaintiff-Appellant,

and

SMITH & JOHNSON, P.C.,

Appellant,

v

GARRY D. ZACHRITZ,

Defendant-Appellee.

No. 254448
Leelanau Circuit Court
LC No. 03-006306-CZ

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff appeals as of right from an order granting defendant summary disposition on the ground that defendant owed plaintiff no duty and from an order imposing sanctions on the grounds that his claim was not warranted by existing law and that plaintiff failed to present a good faith argument in support of a change in the law. We affirm in part and reverse and vacate in part..

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because summary disposition was

granted on the basis of a legal issue and the pleadings, the grant was presumably pursuant to MCR 2.116(C)(8), which "tests the legal sufficiency of the complaint." *Maiden, supra* at 119. Only the pleadings are considered, and they are "construed in a light most favorable to the nonmovant." *Id*. at 119-120.

Plaintiff first argues that the trial court granted summary disposition in part on a misunderstanding of the doctrine of collateral estoppel. Although the trial court discussed collateral estoppel with counsel during the hearing on the motion for summary disposition, the trial court's orders and statements on the record clearly show that collateral estoppel played no part in the court's rulings. Indeed, the trial court repeatedly clarified that the basis of its ruling was only the issue of duty. Therefore, we decline to consider this issue.

Plaintiff also argues that the trial court erred in granting summary disposition before completion of discovery. Summary disposition pursuant to MCR 2.116(C)(10) is generally premature if discovery is incomplete, but it "is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000). However, a motion for summary disposition pursuant to MCR 2.116(C)(8) "is properly granted if it is determined, as a matter of law, that the defendant owed no duty to the plaintiff." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 466; 487 NW2d 807 (1992). Although defendant brought his summary disposition motion under both MCR 2.116(C)(8) and (10), the trial court granted it solely on the basis of a lack of duty. Whether a duty exists is a question of law. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999). Because the legal issue was determined, no further discovery on the remaining elements of negligence would have been appropriate.

Thus, the gravamen of plaintiff's argument on appeal is that the trial court erred in finding that defendant owed him no duty. Although "every person is under the general duty to so act, or to use that which he controls, as not to injure another," *Johnson v A&M Homes*, 261 Mich App 719, 722; 683 NW2d 229 (2004), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), "a defendant owes no duty to an unforeseeable plaintiff." *Balcer v Forbes*, 188 Mich App 509, 512; 470 NW2d 453 (1991). The existence of a "general duty does not necessarily establish a duty owed to [a] particular plaintiff in the facts of [the] case." *Johnson v Detroit*, 457 Mich 695, 710; 579 NW2d 895 (1998). Therefore, negligence requires the establishment of a duty to a *particular* plaintiff. *Id*. at 711. In Michigan, a professional may be liable to a class of foreseeable plaintiffs who might rely on the professional's work product even though they were not parties to the original contract. *Williams v Polgar*, 391 Mich 6, 21-23; 215 NW2d 149 (1974). However, the *Williams* Court emphasized that the class only consists of "those persons [the professional] could reasonably foresee as relying on" the professional's work product. *Id*. at 22. Thus, the rule is that "the third parties to whom a duty is owed are limited to those parties whom the actor reasonably could foresee as relying upon the information provided." *Bonner, supra* at 467-468.

Plaintiff alleges that he was a forseeable beneficiary of defendant's appraisal pursuant to his relationship with the Barratts and the land acquisition procedures followed by the National Park Service. However, plaintiff was only involved in the land transaction as the Barratt's agent. Thus, plaintiff asks us to extend a professional's liability not only to non-contracting third parties who could forseeably rely on the professional's work, but the *agents of* those third parties. We decline to do so. Presuming the causal link to plaintiff is not simply too attenuated, and further

presuming plaintiff forseeably relied on defendant's appraisal, he did so only on the Barratts' behalf, not his own.

The Restatement of Agency, 2d, § 374(2) states:

> A servant or other agent has no action of tort because another has tortiously harmed the principal or destroyed his business, unless the other acted for the purpose of harming the agent's interests.

This is a logical corollary to the agency principle that "[o]ne inference arising out of an agency relationship is that the agent is to act only for the principal's benefit." *In re Susser Estate*, 254 Mich App 232, 235; 657 NW2d 147 (2002). Although § 374(1) explicitly "does not prevent the agent from maintaining an action against the other on his own account," the contemplated defendant's act must be "otherwise a tort upon [the] agent." Thus, irrespective of the law regarding professionals' duties to third parties, plaintiff cannot maintain a cause of action in his personal capacity for an alleged wrong suffered only in his capacity as an agent. The trial court correctly found no duty.

Plaintiff finally argues that, even if the trial court's grant of summary disposition is upheld, the trial court erred in imposing sanctions. "Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case," and review of a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). Likewise, a trial court's "determination whether an attorney or party has violated the 'reasonable inquiry' standard of MCR 2.114(D)(2) depends largely on the facts and circumstances of the claim" and is also reviewed for clear error. *Whalen v Doyle*, 200 Mich App 41, 42; 503 NW2d 678 (1993).

Plaintiff raised a number of arguments regarding an appraiser's duty as a professional to non-contracting third parties. In essence, plaintiff seeks to expand existing law that agents are not precluded from pursuing causes of actions for torts they suffered in their personal capacity *during their agency* to allow an agent to pursue personal causes of action for torts that impacted them *only as an agent*. We agree the trial court did, therefore, clearly err in finding plaintiff's complaint not "well grounded in fact [or] warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," MCR 2.114(D)(2), or in finding plaintiff's "legal position was devoid of arguable legal merit." MCL 600.2591(3)(iii).

Affirmed in part and the award of sanctions is reversed and vacated.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio